

**BEFORE THE
RESPIRATORY CARE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

DONALD W. CLEMENS
220 Marina Way, # 45
Redondo Beach, CA 90277

Case No.: R-2072


OAH No.: L2007050906

DECISION AND ORDER

The attached proposed Decision of the Administrative Law Judge is hereby adopted by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective on August 15, 2007.

It is so ORDERED August 8, 2007.



LARRY L. RENNER, BS, RRT, RCP, RPFT
PRESIDENT, RESPIRATORY CARE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

BEFORE THE
RESPIRATORY CARE BOARD OF CALIFORNIA
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DONALD W. CLEMENS,

Respiratory Care Practitioner
License number 6604

Respondent.

Case No. R-2072

OAH No. L2007050906

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on June 18, 2007, in Los Angeles, California.

Klint James McKay, Deputy Attorney General, represented complainant Stephanie Nunez.

Respondent represented himself.

Complainant seeks to revoke respondent's respiratory care practitioner license based on allegations of use of methamphetamine in a manner dangerous to himself and others. Respondent does not dispute that he used the controlled substance, but presented evidence of mitigation and rehabilitation in support of continued licensure.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

FACTUAL FINDINGS

1. Complainant filed the Accusation in her official capacity as the Executive Officer of the Respiratory Care Board of California (Board).

2. On July 12, 1985, the Board issued Respiratory Care Practitioner License number 6604 to respondent. The license has been regularly renewed since its issuance and expires on April 30, 2008. On May 7, 2007, Administrative Law Judge Joseph D. Montoya issued an order pursuant to Business and Professions Code section 494, temporarily suspending respondent's license.

3. Respondent is 59-years-old. He served in Vietnam and was honorably discharged in 1973. Respondent has been employed as a respiratory care practitioner at Children's Hospital of Los Angeles (Hospital) since he received his license. He works in the Hospital's cardio-thoracic unit.

4. In 2006, respondent's supervisor, Robert Fabro (Fabro), after receiving reports of poor job performance from coworkers, primarily inattention to details and extended breaks, directed respondent to take time off to attend to his diabetes and hypertension, uncontrolled medical conditions believed to have been responsible for the problems at work. Respondent was absent from work from October 6 to November 3, 2006, to receive medical care.

5. In early 2007, Fabro received additional complaints about respondent's continued lack of attention to detail in the care and treatment of patients. For example, respondent was reported to have left a patient to breathe without the assistance of a ventilator for 110 minutes instead of the prescribed 30; he assessed a patient once, when additional assessment was required; he walked away from a patient to attend to an emergency without fully applying tape to secure an endotracheal tube. Respondent's reported lapses could have placed the patients at risk. However, in Fabro's opinion, any risk to patients was minimized by the facts that all patients are highly monitored and that there are other employees that work in the unit.

6. On February 2, 2007, Fabro called respondent to his office and expressed concern about the reported inattention to detail. As a result, Fabro directed respondent to undergo a fitness for duty evaluation.

7. Respondent complied with Fabro's directive and underwent an evaluation later in the day, of which bodily fluid testing was a part. Urine testing revealed the presence of amphetamine, 500 nanograms (ng) per milliliter (ml), and methamphetamine, also 500 ng/ml.

8. Luis Jambor, the director of the laboratory that performed the tests, Quest Diagnostics, expressed no opinion regarding the approximate date of ingestion, but, in agreement with respondent, stated that the drug can be detected in the body for three to four days. He also noted that the instrument used to analyze the urine was very sensitive. Respondent testified that he had ingested methamphetamine two days before and that on the day of the test he was not feeling the drug's effects.

9. In light of the relatively small amount of methamphetamine in respondent's body, the substance's ingestion two days before, and the absence of any objective symptoms of respondent being under the influence, it was not established that on February 2, 2007, respondent used methamphetamine to such extent or in such a manner as to be dangerous or injurious to himself or his patients.

10. On February 15, 2007, as directed by Hospital human resource employees, Fabro suspended respondent. The document imposing the discipline contained the following explanation: "Don failed urine sample test for controlled substance. Don has voluntarily entered rehabilitation program and is working with employee Health Services."

11. Respondent readily admits his addiction to methamphetamine. He began using the controlled substance approximately one year before the positive test. He used it as a recreation drug on his days off. He purchased the methamphetamine from a friend who also used it. Respondent made periodic purchases and inhaled the drug. He denied being under the influence of methamphetamine at work, but conceded that the drug impacted his ability to sleep, which, in turn, may have impacted his stamina and attention at work. On occasion, he called in sick to avoid working under the influence of methamphetamine.

12. On February 8, 2007, respondent entered Twin Town Treatment Centers (Twin Town), an intensive five-month outpatient treatment program. The program has three phases. The first consists of attendance Monday through Saturday, three hours per day, for 20 sessions. Graduation to the second phase requires compliance with all requirements of Phase I, including completing all assignments and obtaining a sponsor. In Phase II, program enrollees are required to attend treatment on Tuesdays and Thursdays, one and one-half hours per day, for 16 sessions. Phase III involves treatment on Tuesdays, at the rate of one and one-half hours per day, for eight sessions. The program includes random biological fluid testing.

13. At the time of the hearing, respondent had successfully completed the first two phases. Although required to attend only one weekly group meeting in Phase III, respondent continues to attend twice weekly. He also attends Alcoholics Anonymous (AA) meetings at least twice each week. Respondent has been clean and sober since the February 2, 2007 test.

14. In a letter dated June 14, 2007, respondent's primary counselor at Twin Town, Amy Edminston, confirmed his participation in the program and noted that respondent has promoted a positive atmosphere with honesty and openness. She noted that respondent was receptive to the recovery program and demonstrated a sincere willingness to continue his sobriety.

15. Respondent expressed shame and embarrassment about his use of methamphetamine. He has cooperated with the Hospital's and the Board's investigations of his substance abuse.

16. William M. Brogan (Brogan) is respondent's sponsor and appeared at the hearing on his behalf. The two have been neighbors for 14 years and have become closer as a result of attending the AA meetings. Brogan sees respondent about four to five times each week, including two or three times each week at AA meetings. Brogan described respondent as a good person who is diligently working on his recovery.

17. Fabro described respondent's work record prior to the recent lapses as "perfect" and referred to him as a "top performer." Fabro welcomes respondent's return to work.

18. Respondent is on medical disability, receiving treatment for diabetes, hypertension, and depression.

19. The Board has incurred charges from the Attorney General, in the amount of \$11,218, in connection with its investigation and prosecution in this matter. Absent objections or contrary evidence, the \$11,218 sum is deemed reasonable.

LEGAL CONCLUSIONS

1. Cause exists to discipline respondent's license pursuant to Business and Professions Code sections 3750, subdivision (g), and 3750.5, subdivision (b), because he used a controlled substance, methamphetamine, in violation of law, as set forth in factual finding numbers 7 and 8.

2. Cause does not exist to discipline respondent's license pursuant to Business and Professions Code sections 3750, subdivision (g), and 2239, subdivision (a), because it was not established that respondent self-administered a controlled substance, methamphetamine, on February 2, 2007, to such extent and to such a manner as to be dangerous or injurious to himself or others, as set forth in factual finding numbers 7, 8, and 9.

3. All evidence offered in mitigation and rehabilitation has been considered. He has a long and productive record with his employer, who wants him to return to work. Respondent does not dispute that he has used methamphetamine in the past. He cooperated with the Hospital and the Board in their investigations. He has taken the first steps on the road to recovery. These steps are encouraging and indicate rehabilitation. However, because the substance abuse is recent, further monitoring is necessary to ensure the public's protection as respondent returns to work. Therefore, the order is necessary, and sufficient, for the protection of the public.

4. Cause exists pursuant to section 3753.5 to order respondent to pay the Board's costs of investigation and prosecution in this matter, in the total amount of \$11,218, by reason of factual finding number 19 and legal conclusion numbers 1 through 3.

In *Zuckerman v. State Board of Chiropractic Examiner* (2002) 29 Cal.4th 32 (2002), the Supreme Court rejected a constitutional challenge to a cost regulation similar to section 3753.5. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost provision did not deter individuals from exercising their right to a hearing. Thus, the board must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the

hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the board must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the board must consider a respondent's ability to pay; and the board may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. *Zuckerman*, supra at p. 45.

In this case, respondent has demonstrated his inability to pay. He is not working and is living from medical disability payments of uncertain duration. Moreover, certain costs are being imposed in the order that follows that will have to be paid in order for respondent to comply with probation. This inability to pay is sufficient under *Zuckerman* to relieve respondent from the obligation to pay the Bureau's costs of investigation and prosecution.

ORDER

Respiratory Care Practitioner License number 6604, issued to respondent Donald W. Clemens is hereby revoked. However, the revocation is stayed and the license is placed on probation for five years on the following terms and conditions.

1. OBEY ALL LAWS. Respondent shall obey all laws, whether federal, state, or local. Respondent shall also obey all regulations governing the practice of respiratory care in California. Respondent shall notify the Board in writing within 14 days of any incident resulting in his/her arrest, or charges filed against, or a citation issued against, Respondent.

2. QUARTERLY REPORTS. Respondent shall file quarterly reports of compliance under penalty of perjury, on forms to be provided, to the probation monitor assigned by the Board. Omission or falsification in any manner of any information on these reports shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

Quarterly report forms will be provided by the Board. Respondent is responsible for contacting the Board to obtain additional forms if needed. Quarterly reports are due for each year of probation and the entire length of probation as follows: For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th. For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th. For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th. For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

Failure to submit complete and timely reports shall constitute a violation of probation.

3. PROBATION MONITORING PROGRAM. Respondent shall comply with requirements of the Board appointed probation monitoring program, and shall, upon reasonable request, report to or appear to a local venue as directed. Respondent shall claim all certified mail issued by the Board, respond to all notices of reasonable requests timely, and submit Annual Reports, Identification Update reports or other reports similar in nature, as requested and directed by the Board or its representative. Failure to appear for any scheduled meeting or examination, or cooperate with the requirements of the program, including timely submission of requested information, shall constitute a violation of probation and will result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

Respondent is encouraged to contact the Board's Probation Program at any time he has a question or concern regarding his terms and conditions of probation.

4. PROBATION MONITORING COSTS. All costs incurred for probation monitoring during the entire probation shall be paid by respondent. The monthly cost may be adjusted as expenses are reduced or increased. Respondent's failure to comply with all terms and conditions may also cause this amount to be increased.

All payments for costs are to be sent directly to the Respiratory Care Board and must be received by the date(s) specified. (Periods of tolling will not toll the probation monitoring costs incurred.)

If respondent is unable to submit costs for any month, he shall be required, instead to submit an explanation of why he is unable to submit the costs, and the date(s) he will be able to submit the costs including payment amount(s). Supporting documentation and evidence of why the Respondent is unable to make such payment(s) must accompany this submission.

Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However, respondent understands that by providing evidence and supporting documentation of financial hardship it may delay further disciplinary action.

In addition to any other disciplinary action taken by the Board, an unrestricted license will not be issued at the end of the probationary period and the respiratory care practitioner license will not be renewed, until such time all probation monitoring costs have been paid.

The filing of bankruptcy by respondent shall not relieve the Respondent of his responsibility to reimburse the Board for costs incurred.

5. EMPLOYMENT REQUIREMENT. Respondent shall be employed a minimum of 24 hours per week as a respiratory care practitioner for a minimum of 2/3 of his probation period.

Respondent may substitute successful completion of a minimum of thirty (30) additional continuing education hours, beyond that which is required for license renewal, for each 8 months of employment required. Respondent shall submit proof to the Board of successful completion of all continuing education requirements. Respondent is responsible for paying all costs associated with fulfilling this term and condition of probation.

6. NOTICE TO EMPLOYER. Respondent shall be required to inform his employer, and each subsequent employer during the probation period, of the discipline imposed by this decision by providing his supervisor and director and all subsequent supervisors and directors with a copy of the decision and order in this matter prior to the beginning of or returning to employment or within 14 days from each change in a supervisor or director.

The employer will then inform the Board, in writing, that he is aware of the discipline, on forms to be provided to respondent. Respondent is responsible for contacting the Board to obtain additional forms if needed. All reports completed by the employer must be submitted from the employer directly to the Board.

Respondent shall execute a release authorizing the Board or any of its representatives to review and obtain copies of all employment records and discuss and inquire of the probationary status with any of respondent's supervisors or directors.

7. CHANGES OF EMPLOYMENT OR RESIDENCE. Respondent shall notify the Board, and appointed probation monitor, in writing, of any and all changes of employment, location, and address within 14 days of such change. This includes but is not limited to applying for employment, termination or resignation from employment, change in employment status, change in supervisors, administrators or directors.

Respondent shall also notify his probation monitor AND the Board IN WRITING of any changes of residence or mailing address within 14 days. P.O. Boxes are accepted for mailing purposes, however respondent must also provide his physical residence address as well.

8. TOLLING FOR OUT-OF-STATE RESIDENCE OR PRACTICE. Periods of residency or practice outside California, whether the periods of residency or practice are temporary or permanent, will toll the probation period but will not toll the probation monitoring costs incurred. Travel out of California for more than 30 days must be reported to the Board in writing prior to departure. Respondent shall notify the Board, in writing, within 14 days, upon his return to California and prior to the commencement of any employment where representation as a respiratory care practitioner is/was provided.

9. **VALID LICENSE STATUS.** Respondent shall maintain a current, active and valid license for the length of the probation period. Failure to pay all fees and meet CE requirements prior to his/her license expiration date shall constitute a violation of probation.

10. **VIOLATION OF PROBATION.** If Respondent violates any term of the probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If a petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended until the matter is final. No petition for modification of penalty shall be considered while there is an accusation or petition to revoke probation or other penalty pending against respondent.

11. **COMPLETION OF PROBATION** Upon successful completion of probation, respondent's license shall be fully restored.

12. **WORK SCHEDULES.** Respondent shall be required to submit to the probation monitor work schedules on a monthly basis for the length of probation. Respondent shall ensure the Board has a copy of his current work schedule at all times for each place of employment. Failure to submit current work schedules on a continuous basis, shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

13. **BIOLOGICAL FLUID TESTING.** Respondent, at his expense, shall participate in random testing, including but not limited to biological fluid testing (i.e. urine, blood, saliva), breathalyzer, hair follicle testing, or any drug screening program approved by the Board. Test costs range from \$21.00 to \$200.00 each. The length of time shall be for the entire probation period. The frequency and location of testing will be determined by the Board.

At all times Respondent shall fully cooperate with the Board or any of its representatives, and shall, when directed, appear for testing as requested and submit to such tests and samples for the detection of alcohol, narcotics, hypnotic, dangerous drugs or other controlled substances.

If Respondent is unable to provide a specimen in a reasonable amount of time from the request, while at the work site, Respondent understands that any Board representative may request from the supervisor, manager or director on duty to observe respondent in a manner that does not interrupt or jeopardize patient care in any manner until such time respondent provides a specimen acceptable to the Board. Failure to submit to testing or appear as requested by any Board representative for testing, as directed shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

14. ABSTENTION FROM USE OF MOOD ALTERING SUBSTANCES. Respondent shall completely abstain from the possession or use of alcohol, any and all other mood altering drugs, substances and their associated paraphernalia, except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment.

Respondent shall execute a release authorizing the release of pharmacy and prescribing records as well as physical and mental health medical records. Respondent shall also provide information of treating physicians, counselors or any other treating professional as requested by the Board.

Respondent shall ensure that he is not in the presence of or in the same physical location as individuals who are using illegal substances, even if respondent is not personally ingesting the drug(s).

Any positive result that registers over the established laboratory cutoff level shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

Respondent also understands and agrees that any positive result that registers over the established laboratory cutoff level shall be reported to each of respondent's employers.

15. RESTRICTION OF PRACTICE. Respondent may not be employed or function as a member of a respiratory care management or supervisory staff during the entire length of probation. This includes lead functions. Respondent is prohibited from working in home care unless it is under direct supervision and personal observation. Respondent is prohibited from working for a registry.

16. DIRECT SUPERVISION. During the period of probation, respondent shall be under the direct supervision of a person holding a current and valid non-restricted Board license. "Under the direct supervision" means assigned to a respiratory care practitioner who is on duty and immediately available in the assigned patient area. The Board shall be informed in writing of and approve the level of supervision provided to the respondent while he is functioning as a licensed respiratory care practitioner. The appropriate level of supervision must be approved by the Board prior to commencement of work.

17. SUSPENSION. As part of probation, Respondent shall be suspended from the practice of respiratory care until he completes the Twin Town program. The Twin Town program director, psychiatrist or psychologist shall confirm that respondent has complied with the all program requirements and shall notify the Board immediately if he/she believes that respondent cannot safely practice. Respondent shall execute a release authorizing divulgence of this information to the Board.

18. **PSYCHOLOGICAL EVALUATION.** Within 90 days of the effective date of this decision, and on a periodic basis thereafter as may be required or directed by the Board, respondent, at his own expense, shall have a mental health examination, including psychological assessment and testing as appropriate, to determine his capacity to perform all professional duties with safety to self and to the public. The examination will be performed by a licensed psychiatrist or psychologist approved by the Board. Respondent shall provide this evaluator with a copy of the Board's disciplinary order prior to the evaluation. The examiner must submit a written report of that assessment and recommendations to the Board. Recommendations for cessation of practice for safety of patients, treatment, therapy or counseling made as a result of the mental health examination will be instituted and followed by the Respondent. All costs incurred for evaluation and treatment are the responsibility of the respondent.

Any examination required of a Respondent whose violation(s) involves substance abuse must be performed by a licensed psychiatrist or psychologist who has established expertise in the field of alcohol and drug assessment, treatment, and recovery.

Respondent shall execute a release authorizing the evaluator to divulge the aforementioned information to the Board.

DATED: 7/6/07

A handwritten signature in dark ink, appearing to read 'Samuel D. Reyes', is written over a horizontal line.

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings